IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 360 OF 2004

1. Shri Lazarus Martins,
major of age, retired,
Government employee,

2. Smt. Eusebina Mazarello
e Martins, wife of Shri
Lazarus Martins, major
of age, housewife, both
r/o House No.373, Baga,
Velim, Salcete, Goa. ... Petitioners.

Versus

1. Shri Shashikant V. Bandekar,
s/o of Vishu Bandekar, major
of age, labourer and

2. Smt. Durgeam S. Bandekar,
wife of Shashikant Bandekar,
major of age, housewife, both
r/o House No.197-A,
Fondubhat, Cuncolim, Goa. ... Respondents.

Mr. N. N. Sardessai, advocate for the petitioners.

Mr. S. L. Naik, advocate for the respondents.

CORAM : **A. P. LAVANDE, J.**

DATE OF RESERVING JUDGMENT : **21st April, 2005.**

DATE OF PRONOUNCING JUDGMENT : **27th April 2005.**

JUDGMENT

Rule. The learned counsel for the respondents waives

notice on behalf of the respondents. By consent heard forthwith.

2. By this petition, the petitioners challenge the Order dated 21st February, 2004, dismissing the application filed by the petitioners for deletion of issue no.4. The petitioners are plaintiffs and the respondents are defendants in Regular Civil Suit no.134/02/D before the Civil Judge, Junior Division, Margao. The petitioners and the respondents shall be hereinafter referred to as the plaintiffs and the defendants. Briefly the facts which are relevant for the disposal of this petition are as follows:

The plaintiffs claim to be owners in possession of property "FONDUBATA" or 'PANDURANGACHE MADDA" situated at Cuncolim, Salcete, Goa. In the said property there exists a structure bearing house no.197 (hereinafter referred to as the "suit house"). According to the plaintiffs, the defendants trespassed in the structure bearing house no.197, which compelled the plaintiffs to file the above mentioned suit. The defendants filed written statement contesting the claim of the plaintiffs and the defendants claimed to be mundkars in respect of the said structure and tenants in respect of the said property. On the pleading of the parties, the trial Court on 14th November, 2004 framed four issues. Issue no.4 which is relevant for the purpose of deciding this petition reads as under:-

> "4. Whether the defendants prove that this Court has no jurisdiction to try and entertain the present suit as they are the tenants with respect of the suit property and mundkars with respect of the suit house?"

3. On 12th December, 2003, the plaintiffs filed an application for deleting issue no.4 which was opposed by the defendants. By the Order dated 21st February, 2004, which is impugned in the present petition, the trial Court dismissed the application for deletion of issue no.4.

4. Mr. Sardessai, learned counsel appearing for the plaintiffs, submitted that he is restricting his challenge to the issue of tenancy framed by the trial Court only and he is not challenging the issue of mundkarship framed by the trial Court. According to the learned counsel, since the suit was in relation to the suit house only and not in respect of the said property, no issue could have been framed by the trial Court in respect of the said property, as claimed by the defendants. According to the learned counsel, the trial Court has exercised jurisdiction illegally by dismissing the said application insofar as the issue of tenancy is concerned. To that extent, according to the learned counsel, the impugned Order discloses error of law apparent on the face of the record. According to the learned counsel, having regard to

the reliefs claimed by the plaintiffs, no issue of tenancy could have been framed by the trial Court.

5. Per Contra, Mr. Naik, learned counsel appearing for the defendants, submitted that the trial Court was absolutely right in framing the issue of tenancy inasmuch as by filing the above suit, the plaintiffs were seeking to illegally oust the defendants from the said property. According to the learned counsel, the issue of tenancy arose on the basis of the pleadings of the defendants in their written statement. The learned counsel submitted that no jurisdictional error has been committed by the trial Court while passing the impugned Order.

6. I have considered the submission made by the learned counsel appearing for the parties. I have perused the plaint and the written statement filed in above suit as well as the impugned Order dated 21st February, 2004. Firstly, it has to be mentioned that the trial Court has framed a composite issue which is not permissible in law. A bare perusal of the said issue discloses that issue no.4 covers both issues of tenancy and mundkarship. Obviously, such an issue could not have been framed by the trial Court. The next question which arises is whether the trial Court was justified in framing an issue of tenancy on the basis of the pleadings of the defendants. Perusal of the plaint

discloses that the reliefs are sought by the plaintiffs only in respect of the suit house and no relief has been sought in respect of the said property. That being the position, I am not in a position to appreciate the approach of the trial Court in framing an issue of tenancy on the basis of the pleading of the defendants. Since the plaintiffs had not sought any relief against the defendants in respect of the suit property, the issue whether the defendants are tenants or not does not arise. In my view, therefore, the trial Court has exercised jurisdiction illegally in framing the issue of tenancy solely on the basis of the pleadings of the defendants. The issues have to be framed on the basis of the pleadings of the parties considering the reliefs sought by the plaintiffs. In the present case, as stated above, the plaintiffs had sought relief only in respect of the suit house and no relief was claimed in respect of the said property and, therefore, no issue of tenancy arose in the suit. Therefore, I am unable to accept the submissions made on behalf of the learned counsel for the defendants.

7. I am, therefore, in agreement with the submissions made on behalf of the plaintiffs. The issue no.4, therefore requires to be re-cast. Accordingly, issue no.4 is re-cast as follows:-

> "Whether the defendants prove that this Court has no jurisdiction to try and entertain the present suit

as they are mundkars in respect of the suit house."

8. In view of the above discussion, the petition is partly allowed. The impugned Order is partly set aside. Rule is made absolute in the aforesaid terms. Having regard to the facts and circumstances of the case, parties are directed to bear their own costs.

A. P. LAVANDE, J.

mc.